83-554

Supreme Court, U.S.
FILED
SEP 30 1983
ALEXANDER L. STEVAS
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NO. _____

IN THE

Supreme Court Of The United States

October Term 1983

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, etc., et al.,
Petitioners,

v.

MARTHA JOHNSON and DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

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Martha Johnson and Delores J. Ceballos, etc., Plaintiffs-Appellants,

v.

UNIVERSITY COLLEGE OF the UNIVERSITY OF ALABAMA IN BIRMINGHAM; George W. Campbell, etc. et al., Defendants-Appellees.

No. 81-7860.

United States Court of Appeals,
Eleventh Circuit.

June 10, 1983.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Judge.

RONEY, Circuit Judge:

This is another in a series of civil rights actions in which the appeal concerns solely the award of attorney's fees under Title VII, 42 U.S.C.A. § 2000e-5 (k), and the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C.A. § 1988, not the merits of the lawsuit. Two weeks prior to the scheduled trial in this employment discrimination class action, the named parties filed a proposed consent decree which the district court accepted. The consent decree acknowledged defendants' obligation to pay plaintiffs' fees, and pledged that the parties would try to negotiate the proper amount. When these efforts proved futile, plaintiffs, in accord with the decree, filed a motion for fees with the court. Discovery, motions to compel and quash, a two-day hearing, and a fight over the terms of an offer of judgment ensued. Finally, nearly one year after the consent decree was filed, the district court awarded interim fees of $50,000. A year later in its final disposition of the fee issue, it awarded an additional $8,183.67, bringing the total award to $58,183.67, an amount which reflected reductions in the hourly rate, hours worked, and litigation expenses that plaintiffs' coun-

sel claimed. Pursuant to Fed.R.Civ.P. 68, the district court assessed costs against plaintiffs because the fee award was less than the amount defendants offered prior to the fee hearing.

Plaintiffs have appealed both the amount of the attorney's fees award and the assessment of costs. We reverse and remand for reconsideration of both. The ensuing discussion considers seriatim the numerous issues raised by this appeal.

I. *Denial of Fees for Time Spent Litigating Fees*

[1] In completely denying plaintiffs' fees for time spent litigating the fee question after the consent decree, the district court followed two rationales. First, the court construed the consent decree, which provided that "[i]n determining attorney's fees the court will be guided by principles outlined by the Fifth Circuit [in] *Johnson v. Georgia Highway Express, [Inc.]*, 488 F.2d 714 [5th Cir.] 1974)," as precluding fees for time litigating fees because *Johnson* did not contemplate the award of such fees. This is simply a misreading of *Johnson*. That case concerned the factors a court should consider in determining the proper amount of an award. It did not concern the stages of litigation for which any attorney's fees may be awarded. Thus the consent decree's reference to *Johnson*, we believe, had nothing to do with the propriety of awarding fees for litigating over fees. Such an award is authorized by the case law, *Johnson v. Mississippi*, 606 F.2d 635, 637-39 (5th Cir. 1979), and plaintiffs did not waive this right.

The second ground given by the district court for denying any award of fees for time spent litigating the fees question, in essence that plaintiffs were completely to blame for the additional litigation, is not supported by the record or the law. Defendants did not make an offer of judgment until nearly eight months after the consent decree became final. Plaintiffs were entitled to a hearing to resolve any disputed issue of fact. *King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980). Assuming their claim was in good faith, which cannot be denied on this record, they cannot be penalized for exercising that right.

II. *Reduction by One-Third of "Reconstructed" Time*

Pursuant to interrogatories and the district court's request for substantiation of time incurred, plaintiffs' counsel submitted contemporaneous billing records for the vast majority of hours worked. Attorney Reeves, however, did not have contemporaneous records for the 100 hours she claimed to have worked. According to her testimony at the hearing, she reached the 100-hour figure based on diary entries and work product found in her files. The district court cut the hours by one-third for failure to maintain contemporaneous records.

[2, 3] The district court did not have to accept Reeves' claim of 100 hours as true, just as it would not have had to do so if the assertion had been supported by contemporaneous billing records. However, while the burden to substantiate a fee is on plaintiff's counsel, *see Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1371 (5th Cir. 1979), Reeves' testimony and secondary documentation supports her claim. The lack of contemporaneous records does not justify an automatic reduction in the hours claimed. *See Harkless v. Sweeny Independent School District*, 608 F.2d 594, 597 (5th Cir. 1979) (affirming award despite absence of time records).

III. *Deletion of Time Spent by Out-of-Town Counsel Due to "Unnecessary Duplication"*

[4] The district court excluded some of the work time spent by defense counsel based on a finding "of unnecessary duplication of effort and time due to the association of the two attorneys from Mobile." The court also deleted all of the time incurred by the two attorneys traveling to Birmingham, the site of the trial litigation. The present limited finding and the existing record does not sustain this reduction. The district court has failed to specify any instances of duplicative effort, so it cannot be determined whether any reduction for duplication is warranted. *See Tasby v. Estes*, 651 F.2d 287, 289-90 (5th Cir. 1981) (quoting *Northcross v. Board of Education*, 611 F.2d

624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980)).

[5, 6] The retaining of multiple attorneys in a significant, lengthy employment discrimination case such as this is understandable and not a ground for reducing the hours claimed. The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work. While *Johnson* recognizes the possibility of unnecessary duplication for which double compensation should not be granted, 488 F.2d at 717, a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work. An award for time spent by two or more attorneys is proper as long as it reflects the distinct contribution of each lawyer to the case and the customary practice of multiple-lawyer litigation. *Ward v. Kelly*, 515 F.2d 908, 912 n. 11 (5th Cir. 1975). *See also Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188 (11th Cir. 1983).

[7] Since plaintiffs had the right to retain more than one attorney, the exclusion of out-of-town counsel's travel time is proper only if it was unreasonable not to hire qualified local counsel. *Cf. Dowdell*, (travel expenses may be recoverable); *McPherson v. School District # 186*, 465 F.Supp. 749, 758 (S.D. Ill. 1978) (compensating out-of-town counsel for travel time to litigation site but at lower rate). We note that "civil rights litigants may not be charged with selecting the nearest and cheapest attorney." *Dowdell*, 698 F.2d at 1192.

IV. *Exclusion of Evidence (Restriction on Discovery) of Defendants' Fees and Expenses in this Case*

Pursuant to a defense motion, the district court quashed a subpoena sought by plaintiffs requiring the defendants to produce all records showing the hours expended by counsel, expenses incurred, and fees paid. The court reasoned, among other things, that this defense information was irrelevant to the reasonable fees and hours of plaintiffs' counsel. The court reaffirmed its position at the evidentiary hearing, sustaining a

defense objection to questions concerning the fees charged in this case by defense counsel. The court also refused to admit into evidence, except in regard to expenses, the billing statements of defense counsel in this case, which plaintiffs had obtained in related state litigation. Without objection, however, plaintiffs did inquire about the hourly rate billed by a lead defense counsel, John J. Coleman, Jr.

[8] Without suggesting that it would have been error to admit such evidence, we cannot hold that the district court abused its discretion in quashing the subpoena or in sustaining the objection at the hearing in this case. This Court has questioned the relevance of the number of hours spent by defense counsel to a determination of the reasonable fee for plaintiffs' attorneys. *Harkless v. Sweeny Independent School District,* 608 F.2d at 598. The amount of hours that is needed by one side to prepare adequately may differ substantially from that for opposing counsel, since the nature of the work may vary dramatically. The case may have far greater precedential value to one side than the other. *Mirabal v. General Motors Acceptance Corp.,* 576 F.2d 729, 731 (7th Cir.), *cert. denied,* 439 U.S. 1039, 99 S.Ct. 642, 58 L.Ed.2d 699 (1978). With respect to the hourly rate, one side may employ far more experienced counsel. Of course, a district court might properly determine in a given case that these concerns merely go to the weight of the evidence, not to its admissibility or discoverability. *See, e.g., Stastny v. Southern Bell Telephone & Telegraph Co.,* 458 F.Supp. 314, 318 (W.D.N.C. 1978) (deeming fees and expenses of defense counsel relevant to determining reasonable award for plaintiffs' counsel), *rev'd in part on other grounds,* 628 F.2d 267 (4th Cir. 1980). But we cannot conclude that the district court abused its discretion here.

Plaintiffs had many avenues to obtain evidence to support their fee petition. Plaintiffs submitted numerous affidavits from other local attorneys concerning their customary fee for litigation-related work. Other affidavits from attorneys discussed the reasonableness of the fee request. In addition, the court allowed plaintiffs to submit much information concern-

ing defense fees. The court advised plaintiffs at the hearing that they could inquire about defense counsel's customary fee, just not their fee in this particular case, and plaintiffs were able to question one defense attorney about the hourly rate he charged in this case.

V. *Striking of Plaintiffs' "Acceptance" of Defendants' Offer of Judgment*

In July 1980, eight months after the consent decree became effective and more than a month before the fee hearing, the defendants submitted pursuant to Fed.R.Civ.P. 68 a formal offer "to allow judgment to be taken against [them] in this action in the amount of $75,000 for attorney's fees, expenses and costs." Plaintiffs purported to accept the offer, but stated that the acceptance only settled the fees and expenses for work done prior to January 15, 1980, the day they filed their outstanding motion for fees and expenses incurred through January 14. In other words, plaintiffs' acceptance did not cover their claim for fees incurred while litigating the fees issue or any fees incurred in the future to enforce the consent decree. Defendants immediately filed a motion to strike the "acceptance," which the district court granted, directing the clerk not to accept a judgment "inconsistent" with the offer. Plaintiffs did not file a second, broader acceptance, and the offer expired pursuant to Rule 68.

[9] This issue turns on defendants' intent in making the offer. Under elementary principles of contract law, an offeree cannot accept a different offer from that made by the offeror. There must be a meeting of the minds. *See Cruz v. Pacific American Insurance Co.*, 337 F.2d 746, 749 (9th Cir. 1964); *Greenwood v. Stevenson*, 88 F.R.D. 225, 230 (D.R.I. 1980).

[10] On appeal, plaintiffs assert error in the striking of their acceptance of the offer. The district court's determination that the acceptance and offer were inconsistent is not clearly erroneous. The offer nowhere indicated that it encompassed only costs and fees incurred prior to the January 15 motion. To the contrary, the language seems all encompassing.

VI. *Exclusion of Computer Expenses*

[11] The district court completely denied nearly $3,000 worth of "computer services" allegedly incurred by plaintiffs, reasoning that plaintiffs failed to explain the nature of the services as required by a court order directing plaintiffs to substantiate all claimed expenses with "invoices, evidence of payment, and reason for the expense." In response to the order, plaintiffs submitted ledger sheets which reflected various costs, including computer expenses, and furnished defendants with invoices. While they never provided any explanation for the costs, one of their attorneys at the hearing voiced her willingness to explain the computer costs then. Inexplicably, neither defense counsel, who was questioning plaintiffs' attorney at the time, nor the court requested that she do so.

Given that plaintiffs furnished invoices and ledgers, and agreed to explain the expenses, they obeyed the court order in substantial part. While the ledger entries may not have supported all of the claimed expenses, as defendants assert, this does not justify the court's complete denial of expenses. The district court rendered its decision 13 months after the hearing, and we conclude that the court overlooked the plaintiffs' compliance with the court order. On remand, the court should reconsider whether any or all computer costs are recoverable in this case. The test, as always, is one of reasonableness. "[W]ith the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs. . . ." *Dowdell*, 698 F.2d at 1192.

VII. *Hourly Rate*

[12] The district court set an identical hourly rate for each of plaintiffs' attorneys, with the rate increasing each year of the litigation to reflect greater experience and increases in customary fees. The rates determined by the court were as follows:

1974	$35.00
1975	$40.00
1976	$45.00
1977	$55.00
1978	$58.00
1979	$60.00
1980	$65.00

These figures, while less than those requested by plaintiffs, were in accord with substantial evidence as to customary fees of equally experienced local counsel. Without going into unnecessary detail, a few examples of the supporting evidence are helpful. A former President of the Birmingham Bar Association with experience in Title VII litigation, James Barton, testified that during the seven year period of this litigation a "very experienced and well-qualified attorney" could charge between $50 and $80 per hour, with a less experienced attorney of 10 years or less in practice charging $35 to $50 an hour. All of plaintiffs' counsel were in their first ten years of practice for most if not all of the litigation. Mr. Barton termed plaintiffs' request "far outside the range of fees generally charged" in Title VII work. A survey by the Alabama Bar Association showed the average billing rate in 1978 in Jefferson County, which includes Birmingham, to be $57.68. The majority of those surveyed had been admitted as long as plaintiffs' most senior attorney. While plaintiffs introduced some evidence supporting their petition, the rates set by the court were not clearly erroneous.

As it should have, the court considered all of the *Johnson* factors, indicating how, if at all, each influenced the fee award. *Fitzpatrick v. IRS*, 665 F.2d 327, 332-33 (11th Cir. 1982); *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 582-84 (5th Cir. 1980). On appeal, plaintiffs complain in particular about the court's application of two of the factors: undesirability and contingency.

The district court determined this significant civil rights litigation could not be deemed undesirable to attorneys whose

practice in large measure consists of plaintiffs' civil rights work. *Norwood v. Harrison,* 410 F.Supp. 133, 142 (N.D. Miss. 1976), *aff'd,* 581 F.2d 518 (5th Cir. 1978). Indeed, the success of counsel in this case may very well generate other representations in similar cases. The district court cannot be reversed because of its handling of this *Johnson* factor.

[13, 14] The district court enhanced the fee by 10 percent based on its contingent nature. Since no compensation is guaranteed in a contingency case, an enhancement for successful counsel may be appropriate. *Jones v. Diamond,* 636 F.2d 1364, 1382 (5th Cir. 1981) (en banc). District courts, however, do not have to adjust every fee upward because of a contingent fee. *Marion v. Barrior,* 694 F.2d 229, 231-32 (11th Cir. 1982). The decision that enhancement is appropriate in this case appears sound. But as to the amount of enhancement the district court apparently based the 10 percent figure on its perception that plaintiffs' counsel was receiving payments from the Lawyer's Committee for Civil Rights for this representation. This Court has held that an award of attorney's fees should not be reduced simply because counsel is receiving some compensation from third parties. *Ward v. Kelly,* 515 F.2d at 912 n. 11; *Thompson v. Madison County Board of Education,* 496 F.2d 682, 689 (5th Cir. 1974); *see Fairley v. Patterson,* 493 F.2d 598, 606-07 (5th Cir. 1974).

VIII. *Failure to Consider Delay in Payment*

[15] The district court awarded the plaintiffs historical rates, reflecting the reasonable fee at the time the work was performed, apparently without any enhancement for delay in payment. Such delay obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one. As a result, district courts should take into account inflation and interest, perhaps by adjusting the contingency factor to reflect delay, not just contingency, or perhaps by compensating at current, not historical, rates. *See Copeland v. Marshall,* 641 F.2d 880, 893 (D.C.Cir. 1980) (en banc); *Northcross v. Board of Education,* 611 F.2d 624, 640 (6th Cir. 1979), *cert.*

denied, 447 U.S. 911, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980). We do not prescribe any set method for correcting for delay in payment, but some form of correction must be undertaken. The district court should do so on remand. If this requires a reevaluation of the historical hourly rates, the district court is free to approach the delay problem in that manner. *See Morgado v. Birmingham-Jefferson County Civil Defense Corps,* Slip op. p. 3366 at 3377, F.2d ____ (11th Cir. 1983) [No. 81-7282].

IX. *Conclusion*

This nation has sought to protect citizens' most basic, cherished rights and liberties by enacting a plethora of civil rights laws. Congress recognized in the Fees Act and in Title VII, however, that effective enforcement of those laws depends to a large extent upon the action of private citizens, not just governmental officials. *See* H.Rep. No. 238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2147-48. It also perceived that most victims of civil rights violations lacked the resources to obtain the legal counsel necessary to vindicate their rights through the judicial process. H.R.Rep. No. 1558, 94th Cong., 2d Sess. (1976). Adequate fee awards are essential to the full enforcement of the civil rights statutes and are an integral part of the remedies necessary to secure compliance with those laws. S.Rep. No. 1011, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5911. The standards and principles underlying the Fees Act and the fee provisions of Title VII are the same. *See id.* at 4, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5912; *Salone v. United States,* 645 F.2d 875, 879 (10th Cir. 1981).

Congress further recognized that effective enforcement of civil rights laws depends on fee awards sufficient to attract competent counsel without producing a windfall to the attorneys. To this end, it explicitly expressed its intent that the "amount of fees awarded [under the Fees Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . .", and that fee computations result in payments, "as is traditional with attor-

neys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' " S.Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913 (quoting *Davis v. County of Los Angeles*, 8 Empl.Prac.Dec. (CCH) ¶ 9444 (C.D. Cal. 1974) and *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 684 (N.D.Cal. 1974)). This Court has recognized that "the standard of reasonableness is to be given a liberal interpretation." *Dowdell*, 698 F.2d at 1192.

The procedures for applying the *Johnson* standards, which were cited with approval in the legislative history to the Fees Act, S.Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5913, have been set out in numerous cases such as *Fitzpatrick v. IRS*, 665 F.2d at 332-33, and *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d at 583 & n. 15. As most attorney's fees cases demonstrate, application of these principles should result in a reasonable fee which meets the goals of the statutes. In the last analysis, however, the fulfillment of the congressional purpose depends upon the ultimate judgment of the district court, not just the mechanical application of established principles. This case entailed eight years of litigation resulting in the successful vindication of important rights. The voluminous record reveals that plaintiffs' attorneys confronted complicated factual and legal issues as well as a group of defendants who staunchly resisted their efforts at almost every turn. Despite these obstacles, they attained a significant victory and established a mechanism for ensuring that defendants' future employment actions comport with the civil rights laws. The fees awarded to plaintiffs' attorneys should reflect the congressional purpose in enacting the Fees Act and Title VII.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARTHA JOHNSON and DOLORES CEBALLOS; et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 74-G-1378-S
UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; et al., Defendants.	)	

MEMORANDUM OPINION

This cause is before the court upon motion of plaintiffs for award of attorneys' fees and costs dated February 13, 1980, pursuant to the consent decree filed October 29, 1979, and approved November 21, 1979. A full evidentiary hearing on the issue of attorneys' fees and costs was held in this cause on August 27-28, 1980. By order of this court, interim fees were granted in the amount of $50,000.00 to the firms of Reeves and Still, and Blacksher, Menefee & Stein, and $1,250.00 to Michael Crespi.

The parties expressly adopted the standards in the Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in the consent decree of October 29, 1979, to govern the fee determination. Consent Decree, Para. 8. Accordingly, the exclusive focus by this court is on the twelve factors discussed in *Johnson*.

1. *Time and Labor Required:*

The time and labor reported by counsel in the cause reveal the following hours:

	Hours	
Mr. Crespi	68.65	hours
Mr. Still	39.2	hours in-court time[1]
	300.9	hours out-of-court time
Mr. Blacksher	5.5	hours in-court time
	86.5	hours out-of-court time
Mr. Menefee	5.5	hours in-court time
	220.1	hours out-of-court time
Ms. Reeves	30.45	hours in-court time
	603.96	hours out-of-court time

The first issue before this court is whether to allow counsel to recover compensation for the attorney fee litigation; the hours claimed in the above chart do include hours expended in pursuit of the attorney fee claim.

The court in *Johnson v. Georgia Highway Express,* the case referred to in the consent decree to set the parameters of the attorney fee award, referred only to the time and labor required to litigate the case on the merits and neither refers to nor implies the possibility of compensation for attorney fee litigation. The question of compensation for attorney fee litigation was not considered by the Fifth Circuit until *Johnson v. Mississippi,* 606 F.2d 635 (5th Cir. 1979), which was decided November 16, 1979, after entry of the consent decree in this case. The court in *Johnson v. Mississippi* expressly stated that the issue had not been determined before by the Fifth Circuit. *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir. 1979). Accordingly, when the parties to this action agreed to accept a fee based on the *Johnson v. Georgia Highway Express* principles, the parties did not contract nor contemplate that such an award would include time expended in litigating the attorney fee question.

[1]In-court time occurred on 6/27/77, 6/30/77, 7/5/77, 12/20/77, 8/20/80 and 8/28/80, according to Agreed Statement No. 6. Because Ms. Reeves' records reveal that the hearing on 8/27/80 lasted for 5.5 hours, that amount of time is used for all parties, although some of the other attorneys had more time accredited to the hearing and preparation.

Additionally, it was the plaintiffs that requested the evidentiary hearing which brought into play the full panoply of discovery. It seems inequitable to pay the plaintiffs a premium because they brought on additional litigation after the consent decree, including time spent filing motions that appear extraneous and unnecessary. Accordingly, the hours for each attorney should be limited as follows:

	Hours
Mr. Crespi	52.85 hours
Mr. Still	31.7 hours in-court-time
	177.25 hours out-of-court time
Mr. Blacksher	79.7 hours out-of-court time
Mr. Menefee	177.4 hours
Ms. Reeves	22.2 hours in-court time
	533.66 hours out-of-court time

In addition to the reduction for time spent on litigating the attorney fee issue, the court also feels that it should reduce by one-third (33⅓ percent) the time that has been "reconstructed" due to counsel's failure to keep accurate time records, even though counsel were aware that any fee claim would have to be justified by presentation of accurate time records. The burden of proving the reasonableness of a fee request is on the plaintiffs. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) Thus, the hours of counsel that reconstructed some of their time should be reduced as follows:

		Hours
Mr. Crespi	52.85 × 66⅔% =	35.23 hours
Ms. Reeves	22.2 × 66⅔% =	14.80 in-court hours
	88.98 × 66⅔% + 444.68 =	503.99 hours out-of-court time

Furthermore, this court finds that there was unnecessary duplication of effort and time due to the association of the two attorneys from Mobile, Mr. Blacksher and Mr. Menefee. While it may be argued that Mr. Still, who is an excellent trial lawyer in the field of Title VII litigation, did not need the counsel from Mobile, defendants have condeded that Mr. Blacksher and Mr. Menefee's expertise in a similar case may have contributed to this cause and have only requested a reduction in hours that are clearly duplicative. Other hours that are excluded, in the exercise of the discretion of the court, are: (1) hours spent by Ms. Reeves to secure financing of co-counsel, (2) traveling time to and from Birmingham by Mr. Blacksher and Mr. Menefee, (3) performance of clerical tasks by Mr. Still and Ms. Reeves, and (4) time spent obtaining and reviewing statements for legal fees rendered to defendant by defendant's counsel in the *Johnson v. Hill* litigation in state court, after this court had ruled that such information was not relevant. The exclusion of these hours provides each attorney with the following hours after the other reductions:

	Hours
Mr. Crespi	35.23 hours
Mr. Still	25.7 hours in-court time
	157.25 hours out-of-court time
Mr. Blacksher	72.7 hours
Mr. Menefee	157.4 hours
Ms. Reeves	8.8 hours in-court time
	459.0 hours out-of-court time

2. *The novelty and difficulty of the questions.*

The court did not find this case to involve any novel or unusually difficult questions of law. Sufficient precedent existed in the Title VII area to guide counsel, although the unique organizational structure of the University College did not make this a simple case.

3. *The skill requisite to perform the legal service properly.*

Johnson states that the trial court is uniquely able to judge the novelty of the issues and the skill of the lawyers, based on its own observation and experience. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). Any special consideration of legal skills is proper only when counsel's quality of performance is notably below or above that of the average competent attorney in the same type case. *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), cited in *Lindy II*, 540 F.2d 102, 117 (3d Cir. 1976). Accordingly, this court finds that the fee award should not be increased or decreased due to this factor.

4. *The preclusion of other employment by the attorney due to acceptance of the case.*

There was no evidence presented to the court of any employment that was turned down by counsel in the cause due to this litigation; accordingly, this factor will not be used by the court to enhance the fee award.

5. *The customary fee.*

Before any enhancement, counsel for the plaintiffs have suggested the following hourly rates:

Mr. Crespi	—	$40.00	
Mr. Still	—	$87.50	in-court
		62.50	out-of-court
Mr. Blacksher	—	$62.50	
Mr. Menefee	—	$62.50	
Ms. Reeves	—	$87.50	in-court
		62.50	out-of-court

After enhancement, the plaintiffs suggest that the hourly rates should be $112.50 for out-of-court time and $150.00 for in-court time. These proposed hourly rates are excessive.

Without addressing the question of enhancement, this court would first point out that it is inappropriate to apply 1980 customary rates to all years during which plaintiffs' counsel worked on this lawsuit. This court prefers to determine the fee on an annual basis, applying the hours worked each year to the customary fee that year.[2]

According to the evidence presented to the court, the average customary rates in Birmingham for attorneys with experience similar to that of Ms. Reeves, Mr. Still, Mr. Blacksher, and Mr. Menefee would appear to be: 1974 - $35.00, 1975 - $40.00, 1976 - $45.00, 1977 - $55.00, 1978 - $58.00, 1979 - $60.00, and 1980 - $65.00. Consistent with this determination, the attorneys' fees would be as follows:

Ms. Reeves

1974:	98.3	× $35.00	=	$3,440.50	
1975:	191.7	× $40.00	=	7,668.00	
1976:	25.8	× $45.00	=	1,161.00	
1977:	35.7	× $55.00	=	1,963.50	
1978:	15.5	× $58.00	=	899.00	
1979:	93.0	× $60.00	=	5,580.00	
1980:	7.8	× $65.00	=	507.00	
					$21,219.00

Mr. Still

1976:	7.0	× $45.00	=	$ 315.00	
1977:	94.0	× $55.00	=	5,170.00	
1978:	16.65	× $58.00	=	965.70	
1979:	62.65	× $60.00	=	3,750.00	
1980:	3.4	× $65.00	=	221.00	
					$10,421.70

[2]However, with respect to Mr. Crespi's fee request, the parties have agreed to a $40.00 an hour *composite* rate for the years in which Mr. Crespi participated, 1974 to mid-1976.

Mr. Blacksher

1976:	27.0	× $45.00	=	$1,215.00	
1977:	14.0	× $55.00	=	770.00	
1978:	17.5	× $58.00	=	1,015.00	
1979:	14.2	× $60.00	=	852.00	
					$ 3,852.00

Mr. Menefee

1976:	59.0	× $45.00	=	$2,655.00	
1977:	89.0	× $55.00	=	4,895.00	
1978:	3.0	× $58.00	=	174.00	
1979:	6.4	× $60.00	=	384.00	
					$ 8,108.00

Mr. Crespi

35.23 × $40.00 = $1,409.20

The court did not differentiate between in-court and out-of-court hourly rates or other differentiations between rates for tasks performed, but the court chose instead to use an average hourly rate.

6. *Whether the fee is fixed or contingent.*

It is noted by this court that a district court is required to consider, in setting attorneys' fees, whether the fee is fixed or contingent. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974). However, the predominant number of Title VII cases which follow the *Johnson* principles have not granted *any* premium for contingency; the only such case in this circuit cited to this court, *Martin v. University of South Alabama*, Dk. No. 75-0473-P (S.D. Ala. 1978), only added a ten percent enhancement, a percentage by which this court plans to enhance the base amounts.

The contingency nature of this action was reduced by the payments made to Ms. Reeves by the Lawyers Committee in the years 1974, 1975, and 1976. These payments made the financial risk minimal.

It is noted by this court that plaintiffs attempt to justify the association of Mr. Menefee and Mr. Blacksher on the basis that their association spread the financial burden and risk. This argument is rejected by the court; an increased number of lawyers does not spread the risk.

7. *Time limitations imposed by the client or the circumstances.*

Plaintiffs have made no claims of any burdens caused by unusual time pressures in this court.

8. *The amount involved and results obtained.*

This court is aware that this circuit has held that a court does not have to sever an attorney's work into issue parcels to determine the successful claims for purposes of a fee award. *Miller v. Carson,* 628 F.2d 346, 348 (5th Cir. 1980). Plaintiffs were obviously successful in most of their claims. Also, it is improper to tie the attorneys' fee award to the financial relief awarded the plaintiffs. *Harkless v. Sweeny Independent School District,* 608 F.2d 594 (5th Cir. 1979).

However, in examining the results obtained in this cause, the court must note that only *five* individuals out of the potential class of 112 (excluding the two named plaintiffs) have sought to advance a claim. This lack of interest by the class precludes this litigation from being characterized as "watershed litigation."

9. *The experience, reputation and ability of the attorneys.*

Ms. Reeves was admitted to practice law in 1967. Between 1967 and 1973, Ms. Reeves was employed by the University of Alabama, the Department of Agriculture, and the Department of Justice. She has been in the private practice of law since the fall of 1973, at which time she was associated with the Lawyers' Committee for Civil Rights Under Law.

Mr. Still was admitted to practice law in August 1971, and has been in the private practice of law since that time. This

court is well aware of Mr. Still's excellent abilities as a trial lawyer in Title VII litigation.

Mr. Blacksher was admitted to practice law in 1971 and served as a federal judicial law clerk from January to December 1971. Since January 1972, he has engaged in the private practice of law.

Mr. Menefee was admitted to practice law in August 1971. From August 1972 to August 1973 he served as a law clerk to a federal judge and has been engaged in the private practice of law since August 1973.

It is noted by this court that counsel's experience and ability has increased over the period of this case; this experience and ability necessarily was less in 1974 than it is today. This fact lends further support to the court's award of different hourly rates for different years.

10. *Undesirability.*

The attorneys involved in this cause are well-known members of the plaintiffs' civil rights bar in this state. The nature of their practice would not lead this court to assume that they feel such cases as this one to be undesirable; on the other hand, their success in this cause should benefit them in securing future employment.

11. *Nature and length of relationship with client.*

The plaintiffs' counsel in this cause have not had any significant professional relationship with any of the clients in this cause outside of this action; thus, no facts have been asserted which should affect the fee in this regard.

12. *Awards in similar cases.*

This court feels that an enhancement of ten percent is appropriate in this cause due to the factors outlined above and similar cases in this district.

In the case of *James v. Stockham Valves & Fittings Co.*, Dkt. No. 70-G-0178-S, this court allowed an enhancement of 25 per-

cent; however, that action was totally contingent, watershed, and provided new authority and new law in the field.

In a recent sex and age discrimination case, *Jones v. Cleland*, 466 F. Supp. 34 (1978), which involved novel issues of law and questions of first impression, affirmed by the Fifth Circuit on June 6, 1980, this court awarded an attorney's fee calculated at the rate of $75.00 per hour to an attorney of 25 years experience, scarcely more than the rate in this cause after enhancement, and this cause did not involve any novel issues.

Furthermore, this court recently awarded William F. Gardner, who has a national reputation in the field of employment discrimination and over 20 years experience, only $75.00 an hour in a Title VII case which involved six years of litigation and over 1,200 hours of preparation. *Perry v. EEOC*, Dkt. No. 75-G-1476-S (N.D. Ala. December 16, 1980).

The award in this cause as calculated herein, plus a ten percent enhancement, totals $47,960.77 to the law firm of Blacksher, Menefee & Stein and the firm of Reeves and Still, and $1,550.12 to Michael Crespi.

The expense claims of each attorney are outlined below:

Mr. Crespi		
Postage and other incidental expenses (Motion for Award of Attorney's Fees, May 12, 1980)		$ 15.00
Ms. Reeves		
Long distance calls to Charlotte Gafford, Blacksher and Menefee, and Department of Justice	$ 12.50	
Telephone	6.22	
Xerox Copying	275.50	
Perez Deposition	613.80	
Mailing Costs	95.00	
Publications	3.50	
TOTAL		$ 1,006.52

Mr. Still		
Telephone:		
October 1976 - March 1980	$ 648.40	
April 1980 - July 1980	130.07	
August 1980	45.50	
Statistical Clerk, May 1977	25.30	
Service of Subpoenas, June 30, 1977	20.00	
Printing Class Notices, February 23, 1979	57.71	
Post Cards for reminder notices, April 9, 1979	16.25	
Paralegal: Inspection of records produced by UAB, 9 hours at $4	36.00	
Paralegal Research, 6.5 hours at $4	26.00	
Copy Costs: 1976 - March 1980	302.55	
April - July 1980	103.50	
August 1980	72.75	
Filing Fee, *Johnson v. Hill*	37.00	
PIP, printing	10.81	
TOTAL		$ 1,924.34
Mr. Blacksher and Mr. Menefee[3]		
Telephone:		
Through 12/6/79	$ 464.56	
1/14/80 - 7/31/80	117.72	
8/1/80 - 9/22/80	19.40	
Xeroxing Costs:		
Through 1/6/79	403.75	
1/14/80 - 7/31/80	11.75	
8/1/80 - 9/22/80	58.50	
Court Costs	121.80	
Computer Services	2,795.37	
Expert Witnesses	8,997.44	

[3]The expenses through December 1979 appear on Mr. Menefee's affidavit of August 14, 1980. The 1980 expenses are listed in Mr. Menefee's affidavits of August 4, 1980, and September 22, 1980.

Travel Expense:		
Through 12/6/79	905.95	
8/1/80 - 9/22/80	284.06	
Postage Expense:		
Through 12/6/79	17.53	
1/14/80 - 7/31/80	2.78	
8/1/80 - 9/22/80	1.05	
Deposition Expense, 1980	44.85	
Expert Witness, 1980	25.00	
TOTAL		$14,270.79

These costs are adjusted by this court in the following respects:

(1) All xeroxing will be charged at $0.10 per page rather than the $0.15 claimed by Mr. Still and $0.25 per page claimed by Menefee and Blacksher. Ms. Reeves' charges are discounted 33⅓ percent due to her failure to substantiate her claim with any records.

(2) Paralegals' time, since it is treated as a cost, will be reimbursed at the rate at which the cost was incurred by the attorney, i.e., $3.00 an hour, rather than the requested $4.00 an hour rate.

(3) The filing fee of $37.00 for *Johnson v. Hill* is excluded, since that case was filed to obtain information that this court had already ruled to be irrelevant.

(4) All of the long distance phone calls by Mr. Menefee and Mr. Blacksher are excluded as they are unsupported by any documentation and, more importantly, these costs would not have been incurred if local counsel had been associated rather than counsel from Mobile.[4] In addition, the Birmingham-Mobile telephone calls by Mr. Still and Ms. Reeves are excluded as unnecessary expense.

(5) Travel expenses by Mobile counsel are denied.

[4]The whole telephone expense incurred by Mr. Menefee and Mr. Blacksher is excluded since there are no records to determine which calls were made to Birmingham.

(6) The expert witness fee of $25.00 and the 1980 deposition expense of $44.85 claimed by Mr. Menefee and Mr. Blacksher are denied as they appear to relate to Dr. Schlichting, whose testimony at the attorneys' fee hearing was highly irrelevant.

(7) All computer costs designated as "computer services" are denied as counsel have failed to explain the nature of services as required by the order of this court, adopting the magistrate's recommendation, that such costs be further explained.

(8) The $121.08 claimed court costs by Menefee and Blacksher are denied as they are unidentified, contrary to this court's order adopting the magistrate's recommendation.

(9) Finally, the payment to Ms. Reeves by Mr. Menefee and Mr. Blacksher of $315.00, allegedly in payment of 15 witness fees, is reduced to $273.00, as only 13 subpoenas are in the court record. These calculations allow the following costs to remain:

Mr. Crespi		
Postage and other incidental expense[5]	$15.00 × 66⅔% =	$10.00
Ms. Reeves		
Telephone	$ 6.22	
Xerox copying[6]	122.43	
Perez deposition	613.80	
Mailing costs	63.33	
Publications	2.33	
TOTAL		$ 808.11
Mr. Still		
Telephone	$ 401.54	
Statistical clerk	25.30	

[5]This amount, although nominal, is also reduced by 33⅓% as it has not been substantiated by any records.

[6]This amount was reduced (1) by 33⅓% due to lack of records, and (2) to a $.10 charge per page.

Service of subpoenas	20.00	
Printing class notices	57.71	
Post cards for reminder notices	16.25	
Paralegal research	46.50	
PIP, printing	10.81	
Copy costs	379.68	
TOTAL		$ 957.79
Mr. Blacksher and Mr. Menefee		
Xeroxing	$ 166.20	
Expert witnesses	8,997.44	
Postage expense	21.36	
TOTAL		$ 9,185.00

In accordance with the above calculations, this court awards costs in the amount of $10,222.90 to the firms of Reeves and Still and Blacksher, Menefee & Stein, and $10.00 to Michael Crespi.

In their original application plaintiffs did not ask for interest. Their "Motion to Amend Request for Attorneys' Fees," filed August 13, 1981, calls for enhancement based on increase in the Consumer Price Index, and their letter brief of August 12, 1981, cites cases in support of an interest award. However, the holding in *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), makes it clear that an interest award is discretionary with the court and, in footnote 16, that an application which comes too late can be denied. This application came entirely too late and is denied. No authority exists for enhancement based on the Consumer Price Index. Consequently, this application is denied both for lack of merit and for being untimely.

Furthermore, plaintiffs contracted for a particular thing, in adopting the standards of *Johnson v. Georgia Highway Express, supra*. That case does not allow attorneys' fees for time spent litigating the issue of attorneys' fees, nor does it allow interest thereon. Neither does it even discuss these two issues. Plaintiffs have contracted away any right they might have obtained under later cases by their contractual adoption of the *Johnson*

standards. The contract must be interpreted to call for fees based strictly on *Johnson* as it was interpreted at the time the contract was executed—not as it might have been either liberalized or restricted by later judicial interpretation.

There are other equitable grounds which militate against granting either of these untimely enhancement requests. On July 23, 1980, plaintiffs filed with the court an "Acceptance of Offer of Judgment," which the court subsequently ordered stricken and held for naught as not unconditional and therefore inconsistent with the defendants' offer. The court further ordered that defendants' $75,000.00 offer would expire in accordance with Rule 68, Federal Rules of Civil Procedure, unless timely and unequivocally accepted. Although the filing with the Clerk of plaintiffs' "Acceptance of Offer of Judgment" was improper under Rule 68, nevertheless, because it was in fact filed, the court became aware that plaintiffs lost the use of this money after receipt of the Offer of Judgment only because they rejected defendants' offer. Thus, as a matter of equity and good conscience, they would not be entitled in any event to interest after the offer was made.

Additionally, the court notes that plaintiffs were paid $50,000.00 as interim fees. The amount of the fee award as finally determined is less than $50,000.00, although reimbursement of out-of-pocket expenses does, in fact, bring the total award over that amount. Counsel have not under these circumstances been unduly deprived of the use of the money of the fee award.

For all the foregoing reasons, plaintiffs' motion to amend request for attorneys' fees is denied.

A separate order consistent with this memorandum opinion will be entered contemporaneously herewith.

DONE this the 25th day of September 1981.

/s/ J. Foy Guin, Jr.

UNITED STATES DISTRICT JUDGE

J. FOY GUIN, JR.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7860

D.C. Docket No. CA74G-1378S

MARTHA JOHNSON AND DELORES J. CEBALLOS, ETC.,

Plaintiffs-Appellants,

versus

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, ETC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 10, 1983

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7860

MARTHA JOHNSON and DELORES J. CEBALLOS, etc.,

Plaintiffs-Appellants,

versus

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING

August 11, 1983

Before RONEY, CLARK and TUTTLE, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY
United States Circuit Judge